

ANGELA WORTHAM
Claimant

CLAIMS MANAGEMENT, INC.
Insurance Carrier

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- (1) Do the payment limitations and stay provisions of K.S.A. 1999 Supp. 44-556(b) apply only to actions for review by the Court of Appeals or do they extend to review by the Kansas Supreme Court?
- (2) Even if K.S.A. 1999 Supp. 44-556(b) applies only to the Court of Appeals, does Kansas Supreme Court Rule 8.03 extend the payment in K.S.A. 1999 Supp. 44-556(b) until a decision has been rendered by the Kansas Supreme Court?

- (3) Are penalties under K.S.A. 44-512a appropriate prior to the issuance of a final decision by the Kansas Supreme Court?
- (4) Can penalties be awarded under K.S.A. 44-512a when no payments are actually due during the 10 weeks preceding the Board's decision and pending appellate court review?
- (5) Is claimant entitled to penalties under K.S.A. 44-512a for respondent's failure to make payments after the issuance of the decision by the Kansas Supreme Court?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter was originally decided by Administrative Law Judge Nelsonna Potts Barnes on March 19, 1998, at which time claimant was awarded a 6.5 percent functional impairment to the body as a whole. The Administrative Law Judge denied claimant a work disability award, finding claimant's inability to find appropriate employment was due to a non-work-related heart condition, rather than the work-related injury. The Administrative Law Judge found that claimant would have been able to earn a comparable wage but for this heart condition. Therefore, claimant was limited to a functional impairment. That decision was timely appealed to the Board. The Board, after considering the record, found claimant entitled to a 19 percent permanent partial work disability based upon a 26 percent loss of task performing ability and an 11.8 percent loss of wages. The Board granted the work disability award after finding that claimant's permanent work restrictions were from claimant's neck and right upper extremity injuries and not from claimant's non-work-related heart attack.

The Kansas Court of Appeals affirmed the Board's decision in its October 29, 1999, opinion. Respondent timely filed a petition for review by the Kansas Supreme Court. The Supreme Court's order denying review was issued February 11, 2000.

On December 2, 1999, claimant served a demand letter for payment of compensation upon respondent. In that letter, claimant argued that the stay on payment of compensation under K.S.A. 1999 Supp. 44-556(b) applied to appeals before the Kansas Court of Appeals, but did not stay payment of the award pending a decision by the Kansas Supreme Court.

On December 29, 1999, respondent paid claimant \$8,886.64. Two weeks later, respondent paid an additional \$372.72. Additional payments were made in the amount of \$372.72 on January 24, February 7, February 21, March 6 and March 20, 2000. On March 27, \$2,315.82 was paid to claimant. The parties agree that the March 27 payment caused the award to be paid in full.

The Board must first consider whether the limitations of K.S.A. 1999 Supp. 44-556(b) apply to accidents for review by only the Court of Appeals or whether they further apply to appeals before the Kansas Supreme Court.

K.S.A. 1999 Supp. 44-556 provides:

(a) Any action of the board pursuant to the workers compensation act, other than the disposition of appeals of preliminary orders or awards under K.S.A. 44-534a and amendments thereto, shall be subject to review in accordance with the act for judicial review and civil enforcement of agency actions by appeal directly to the court of appeals. Any party may appeal from a final order of the board by filing an appeal with the court of appeals within 30 days of the date of the final order. Such review shall be upon questions of law.

(b) Commencement of an action for review by the court of appeals shall not stay the payment of compensation due for the ten-week period next preceding the board's decision and for the period of time after the board's decision and prior to the decision of the court of appeals on review.

Claimant argues that K.S.A. 1999 Supp. 44-556(b) applies only to decisions of the Court of Appeals on review. Once the Court of Appeals decision was rendered on October 29, 1999, the stay limitations of that statute no longer applied and payments by respondent would be immediately due.

However, in addition to K.S.A. 1999 Supp. 44-556, the Board must also consider Kansas Supreme Court Rule 8.03 which states in part:

The timely filing of a petition for review shall stay the issuance of the mandate of the Court of Appeals. Pending the determination of the Supreme Court on the petition for review, the opinion of the Court of Appeals is not binding on the parties, may not be cited as precedent, and is not binding on the district courts. . . . If review is refused, the decision of the Court of Appeals shall be final as of the date of the refusal, and the mandate of the Court of Appeals shall be issued by the Clerk forthwith.

The Appeals Board finds by virtue of Kansas Supreme Court Rule 8.03 that the limitations set forth in K.S.A. 1999 Supp. 44-556 do apply to appeals to the Kansas Supreme Court, as the opinion of the Court of Appeals is not final pending the decision of the Kansas Supreme Court. Therefore, the Court of Appeals decision issued October 29, 1999, did not become final until respondent's petition for review to the Supreme Court was denied on February 11, 2000.

The Board must next consider whether the penalty provisions of K.S.A. 44-512a would be appropriate pending a Kansas Supreme Court decision on a petition for review. K.S.A. 1999 Supp. 44-556 requires payment of compensation for the 10 weeks preceding the Board's decision, and weekly thereafter, pending the decision of the Court of Appeals.

If compensation is not paid when due, the workman has been provided with a handy and effective tool to force compliance, namely, the procedure outlined in K.S.A. 44-512a. Use of this statute, in our opinion, is the means by which the legislature intended all compensation due and payable should be enforced, including that which is due pending appeal. Hallmark v. Dalton Construction Co., 206 Kan. 159, 163, 476 P.2d 221 (1970).

Respondent's failure to pay benefits under K.S.A. 1999 Supp. 44-556 during the 10 weeks preceding board review, and weekly thereafter, pending the decision of the Court of Appeals, would normally entitle claimant to penalties under K.S.A. 44-512a. However, here, the Board must consider an additional issue. Claimant's injury occurred on September 12, 1995. The award allowed for 40 weeks of temporary total disability compensation, followed by 74.1 weeks of permanent partial disability compensation, a total of 114.1 weeks. With a date of accident in September 1995, the entire 114.1 weeks of benefits would have come due well before the 10-week period preceding the Board's decision.

The Board, on numerous occasions, has held that, when all weeks of disability compensation have accrued before the 10-week period before the Board's decision, then no weekly compensation would be due and payable during that period. Therefore, penalties under K.S.A. 44-512a would not be appropriate. See Urquidi v. Trinity Manor Adult Care Home, WCAB Docket No. 186,568 (May 2000); Landry v. Graphic Technology, Inc., WCAB Docket No. 216,166 (Nov. 1998); Byers v. Morton Buildings, Inc., WCAB Docket No. 173,408 (May 1998); Britt v. Theratronics International, Ltd., WCAB Docket No. 184,811 (Aug. 1997); Hamrick v. Arabian Horse Express, WCAB Docket No. 183,004 (Feb. 1997); Cassady v. Metz Baking Company, WCAB Docket No. 162,695 (Feb. 1996).

In this instance, claimant's request for penalties for respondent's failure to pay the 10 weeks preceding the Board's decision and weekly thereafter would be inappropriate as no weeks were due and owing during that period of time. The decision by the Administrative Law Judge to assess penalties in the amount of \$100 per week for the weeks December 22, 1999, through January 19, 2000, for a total of \$400 is, therefore, reversed.

Finally, the Appeals Board considers whether claimant would be entitled to penalties after the Supreme Court issued its decision on February 11, 2000, declining review of the Court of Appeals decision. Payments made after that date included payments in the

amount of \$372.72 on February 21, March 6 and March 20, and a final payment on March 27, 2000, in the amount of \$2,315.82.

The Appeals Board must decide whether the demand made by claimant under K.S.A. 44-512a on December 2, 1999, would allow penalties for the payments made by respondent after the February 11, 2000, Supreme Court decision.

K.S.A. 44-512a states in pertinent part:

In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount of not more than \$100 per week for each week any disability compensation is past due . . . if: (1) Service of written demand for payment, setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due, has been made personally or by registered mail on the employer or insurance carrier liable for such compensation and its attorney of record; and (2) payment of such demand is thereafter refused or is not made within 20 days from the date of service of such demand.

At the time claimant served its K.S.A. 44-512a demand letter on respondent, there were no amounts under the award which could be deemed past due. The only delay in payment would have occurred after the Supreme Court issued its decision on February 11, 2000.

A statutory demand under 44-512a can only be effective for compensation awarded the claimant then due and unpaid. (*Damon v. Smith County*, 191 Kan. 564, 382 P.2d 311.) When payment of compensation is not delinquent, either under the provisions of 44-556, or by reason of payment or tender of payment on the part of the employer or his insurance carrier, there can be no valid statutory demand upon which to predicate a 44-512a action. Hallmark, 206 Kan. 159 at 161.

The Appeals Board finds that the K.S.A. 44-512a demand letter served by claimant on December 2, 1999, was premature. At the time of its service, there were no compensation payments which would be considered delinquent. The Appeals Board, therefore, finds that the penalties requested in this matter must be denied.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated January 20, 2000, awarding claimant penalties in the amount of \$400 should be, and is hereby, reversed. The decision by the Administrative Law Judge to award claimant's attorney reasonable attorney fees in the amount of \$350 for his post-award services pursuant to K.S.A. 44-536(g) was neither listed as an issue nor argued by respondent's attorney. The Appeals Board, therefore, affirms that portion of the Order. In addition, claimant requested an additional 4 hours attorney time to compensate for the time spent preparing for and arguing to the Board. The Board finds this request to be reasonable and awards claimant's attorney an additional 4 hours at \$125 per hour for a total of \$500 additional post-award attorney fees pursuant to K.S.A. 44-536(g).

IT IS SO ORDERED.

Dated this ____ day of July 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kelly W. Johnston, Wichita, KS
Michael D. Streit, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director